MAY A STATE DENY TO FOREIGN INSURANCE COMPANIES THE RIGHT TO REMOVE SUITS TO THE FEDERAL COURTS?

Paper read before the Association of Life Insurance Counsel, December 2d, 1919, by Thomas B. Gay of Counsel for the Atlantic Life Insurance Company of Richmond, Va.

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The subject of this paper has been selected with the idea of drawing to the attention of Insurance counsel the state of the law regarding the removal of suits to Federal courts by foreign Insurance Companies upon the ground of diversity of citizenship.

The Federal Constitution ordains that the judicial power of the United States shall extend to controversies between citizens of different states,[1] and it is likewise provided that

> "This Constitution and the laws of the United States, which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, nothing in the Constitution or laws of any State to the contrary notwithstanding."[2]

Section 8 of Chapter 3 of the Judiciary Act provides that

> "In any suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction . . . and which are now pending and which may hereafter be brought in any State court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State."

The exercise of this right in certain sections of the country may be truly said to be essential to a fair trial, while it is everywhere desirable in procuring the benefit of uniformity of decision more readily obtainable in the Federal Courts.

As the Supreme Court has held that the taking of insurance risks is not a transaction within the meaning of the commerce clause of the Federal Constitution, Insurance Companies have, in entering foreign states, been reduced to the necessity of complying with local laws defining the conditions upon which they may conduct their business. The power of the states in this regard is subject only to the limitation that restrictions

(1) Art. III, Sec. 2.
(2) Art. IV, Sec. 1.

upon the right of entry must not be repugnant to the Constitution or the laws of the United States.[3] The qualification mentioned was recognized and enforced in *Insurance Company v. Morse*,[4] where the Supreme Court held invalid the agreement of a foreign Insurance Company not to remove suits instituted against it to the Federal courts, and declared unconstitutional a Wisconsin statute requiring the execution of such a contract as a condition precedent to being permitted to do business in that State. This case, decided in 1874, is first in point of time and importance in the present discussion. While the principle which it establishes has been subsequently affirmed, its effect has been distinguished in later cases upon reasoning contrary to what seems to have been the doctrine announced in the decision.

In 1876 the question was again presented from a somewhat different aspect in *Doyle v. Continental Insurance Company*.[5] Here for the first time arose the question of the constitutionality of a further section of the Wisconsin statute providing, in addition to the section dealt with in the *Morse* case, that if any foreign Insurance Company should, in violation of its agreement not so to do, remove a suit to the Federal court, the Secretary of State should revoke its license to transact business in that State. The opinion states that the *Morse* case did not "undertake to decide what were the powers of the State of Wisconsin in revoking a license previously granted to an Insurance Company, for what causes or upon what grounds its action in that respect may be based. . . . The case (Doyle) now before us does present that point, and with distinctness."

The *Doyle* decision is then made to rest upon the principle that as a corporation has no constitutional right to do business in a foreign state, a license so to do is revocable at will and the reason by which the State may be influenced in exercising its rights cannot be inquired into; that as it has the power to cancel the license, it may determine for what causes and in what manner the revocation shall be made. The court says—

> "The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in deter-

(3) Lafayette Ins. Co. vs. French, 18 How., 404.
(4) 20 Howard, 445.
(5) 94 U. S., 535.

mining the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion, which cannot be applied to the affairs of life. If the act done by the State is legal, *is not in violation of the Constitution or laws of the United States,* it is quite out of the power of any court to inquire what was the intention of those who enacted the law."

From this language it would seem that the principle thus announced remains, as was stated in the *Morse* case, subject to the limitation that the action of the State "is not in violation of the constitution or laws of the United States." This being true, it is difficult to reconcile the result in the two cases. The constitution declares that diversity of citizenship shall be a ground of jurisdiction in the Federal courts and the laws of the United States provide that when that fact appears the right of removal shall exist. Any state statute tending to deny or abridge this right would, therefore, seem plainly "in violation of the Constitution and laws of the United States." With this in mind the court continues—

> "It is said that we thus indirectly sanction what we condemn when presented directly; to wit, that we enable the State of Wisconsin to enforce an agreement to abstain from the Federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court."

The correctness of this reasoning is clearly subject to criticism. The court justifies the action of the State in affording the option of not removing causes or ceasing to do business upon the principle that as the corporation has no constitutional right to engage in business in a foreign State, its authority so to do may at any time be revoked for whatever reason the

State may choose to assign. The fallacy of this argument seems apparent in the light of the *Morse* decision, where it is recognized (and not denied in the Doyle case) that although a foreign corporation has no constitutional right to go into a State, domestication cannot be predicated upon the condition that the Federal right of removal be surrendered. If both of these cases are correctly decided, the result is indeed anomalous. A corporation cannot be denied the right to do business in a foreign State upon conditions in abridgment of a Federal right, yet its authority to continue business may be revoked upon its attempt to exercise the right in question. In other words, it cannot be kept out, but may be put out for undertaking to exercise a right guaranteed it under the supreme law of the land. Such a condition seems intolerable and does violence to the commonest conceptions of justice.

The question again came before the court in 1887 and its decision in *Barron v. Burnside*[6] was thought for a long time to have overruled the *Doyle* case. In *Barron v. Burnside,* the court held unconstitutional an Ohio statute requiring a foreign corporation, in an application for a permit to do business in the State, to stipulate that such permit, when granted, should be subject to each of the provisions of an act providing, among other things, that if such a corporation should remove a case to the Federal court, its license should thereupon become null and void. The court affirmed the reasoning of the *Morse* case, and in connection with its decision in the *Doyle* case, said:

> "The point of the decision seems to have been, that, as the State had granted the license, its officers could not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion, which appears to be in conflict with the adjudication in Insurance Company v. Morse, must be regarded as not in judgment."

In harmonizing the effect of the two decisions with the opinion in the instant case, the court said:

> "In both of the cases referred to, the foreign corporation had made the agreement not to remove into the Federal court suits to be brought against it in the state court. In the present case, no such agreement has been

(6) 121 U. S., 186.

made, but the locomotive engineer is arrested for acting as such in the employment of the corporation, because it has refused to stipulate that it will not remove into the Federal court suits brought against it in the state court, as a condition of obtaining a permit, and consequently has not obtained such permit. Its right, equally with any individual citizen, to remove into the Federal court, under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive an individual citizen of another state of his right to remove such suits.

As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void.

The question as to the right of a state to impose upon a corporation engaged in interstate commerce the duty of obtaining a permit from the state, as a condition of its right to carry on such commerce, is a question which it is not necessary to decide in this case. In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States. LaFayette Ins. Co. v. French, 18 How. 404, 407; Ducat v. Chicago, 10 Wall. 410, 415; Ins. Co. v. Morse, 20 Wall. 445, 456; St. Clair v. Cox, 106 U. S. 350, 356; Phila. Fire Assn. v. New York, 119 U. S. 110, 120."

A similar statute was again held unconstitutional in 1892 in *Southern Pacific Co. v. Denton,*[7] the court citing the *Morse* case as well as *Barron v. Burnside.* In *Martin's Executor v. B. & O. R. R. Co.,*[8] decided in 1894, while the court did not have before it any particular statute providing for the forfeiture of the license of a foreign corporation to do business in West Virginia, should it remove a suit to the Federal court, it approves the reasoning of the *Morse* case and *Barron v. Burnside,* saying:

"The Baltimore and Ohio Railroad Company, not being a corporation of West Virginia, but only a corporation of Maryland, licensed by West Virginia to act as such

(7) 146 U. S., 202.
(8) 151 U. S., 673.

within its territory, and liable to be sued in its courts, had the right under the Constitution and laws of the United States, when so sued by a citizen of this State, to remove the suit into the Circuit Court of the United States; and could not have been deprived of that right by any provision in the statutes of the State. Insurance Co. v. Morse, 20 Wall. 445; Barron v. Burnside, 121 U. S. 186; Southern Pacific Co. v. Denton, 146 U. S. 202, 207."

A little later, in 1895, the court in deciding that by filing a petition of removal to the Federal court a non-resident defendant did not thereby waive any right to raise in that court all jurisdictional questions which might have been raised in the State court, says:

"The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and cannot be enlarged or abridged by any statute of a State. The legislature or the judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal. Gordon v. Longest, 15 Pet. 97; Insurance Co. v. Morse, 20 Wall. 445; Barron v. Burnside, 121 U. S. 186; Southern Pacific Co. v. Denton, 146 U. S. 202, 207-209. As was said by this court in Gordon v. Longest, 'One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress.' 16 Pet. 104."

In 1898 the court decided *Barrow Steamship Co. v. Kane*[9] and *Blake v. McClung*,[10] in both of which cases it is held that no State can by legislative enactment defeat the jurisdiction of the Federal courts conferred by the Constitution or the laws passed in pursuance thereof. Each of the prior decisions to which I have referred are cited as authority for the conclusion of the court in these cases.

In *Cable v. U. S. Life Ins. Co.*,[11] decided in 1903, the *Insurance Company* had brought a suit in equity in the United States Circuit Court for the Northern District of Illinois, to enjoin and restrain the defendant therein from prosecuting in the State Court an action at law instituted against it upon a

(9) 170 U. S., 100.
(10) 172 U. S., 239.
(11) 191 U. S., 288.

policy of insurance. In connection with the contention that it had no adequate remedy at law which could be invoked in the Federal Court, the *Insurance Company* pointed out that if it undertook to remove the common law action instituted against it in the State court, it would have its license revoked under an Illinois statute requiring as a condition for authority to do business that it execute an agreement not to remove. In holding the statute void and that the Company therefore had an adequate remedy at law, which by removal could be asserted in the Federal jurisdiction, the court said:

> "No stipulation or agreement, founded on a state statute or otherwise, which the company may have entered into could prevent the removal of the case in the exercise of its constitutional right. This has been so held in Insurance Co. v. Morse, 20 Wall. 445, and that case has been repeatedly approved. See Doyle v. Continental Insurance Co., 94 U. S. 535; Barron v. Burnside, 121 U. S. 186.
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> In Doyle v. Continental Insurance Co., supra, it was held that a State had the right to impose conditions not in conflict with the Constitution or the laws of the United States, to the transaction of business within its territory by a foreign insurance company, and to exclude such company from its territory, or, having given a license, to revoke it, with or without cause, and it was further decided that an injunction to restrain a state officer from revoking and cancelling a license to a foreign company to do business within the State, because the company has, contrary to the state statute, removed a case from the state to the Federal court, would not be granted, and it was remarked that, as the State had the right to exclude a foreign insurance company, the means by which she caused such exclusion or the motives of her action were not the subject of judicial inquiry. Whether this case has been shaken by the subsequent cases of Barron v. Burnside, 121 U. S. 186, 199; Blake v. McClung, 172 U. S. 239, 254, and Dayton Coal & Iron Co. v. Barton, 183 U. S. 23, 24, it is not material here to discuss. It has from an early day been held that a corporation created by one State could transact business in another State only with the consent, express or implied, of the latter State, and that such consent might be accompanied by such conditions as the latter State might think fit to impose, provided they were not repugnant to the Constitution or laws of the United States, or inconsistent

with those rules of public law which secure the jurisdiction and authority of each State free from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence. LaFayette Insurance Co. v. French, 18 How. 404, 407; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28; New York Life Insurance Co. v. Cravens, 178 U. S. 389, 401; Hancock Mutual Life Insurance Co. v. Warren, 181 U. S. 73, 76."

The query of the court regarding the probable effect of *Barron v. Burnside* and the later cases upon the decision in the *Doyle* case found a prompt though disappointing answer in the decision of *Security Mutual Life Insurance Co. v. Prewitt,*[12] decided in 1906, where the court holds constitutional a Kentucky statute providing that if any foreign insurance company remove a case to the Federal court without the consent of the other party thereto, it shall be the duty of the Commissioner of Insurance to forthwith revoke such company's authority to do business in that State. The court distinguishes the *Morse* decision upon the ground that in that case an agreement was required in advance purporting to waive the Federal right, and affirmed its finding in the *Doyle* case to the effect that as a corporation has no constitutional right to engage in business in a foreign state, the revocation by such state of that authority could not be questioned because of the reason assigned for excluding it. The *Prewitt* case also holds that *Barron v. Burnside* did not overrule the *Doyle* decision as it (Barron v. Burnside) only held invalid a statute similar to the one passed upon in the *Morse* case requiring waiver of the Federal right as a condition precedent to do business in the State. Speaking of its opinion in *Barron v. Burnside* and the effect of that decision upon the *Doyle* case, the court said:

"If it had been the intention of the court in Barron v. Burnside to overrule the Doyle case, it was easy to have said so. Instead of that, the opinion rests upon the ground of the agreement to be exacted as a condition of granting the permit, and that the statute was not separable into parts, and it was held that the requirement of such a stipulation was void. It was not held that such a statute as the one of Kentucky now under consideration was void. Such statute exacts no agreement or stipulation in any form or in any part of the statute.

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(12) 202 U. S., 246.

The most that can be contended for is that the Barron case holds that where the statute exacts a stipulation in advance, as a condition of granting a permit, and the statute is not separable into parts, the whole statute is void, and a provision for withdrawing the permit, if a case is removed, is not saved. That principle, as we have said, does not touch this case, as there is no exaction of a stipulation at any time.

It has not been decided that a statute which has no requirement for a stipulation or agreement not to remove is void, if there be simply a provision therein for a revocation of the permit, such as is contained in the statute under review.

As a State has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial."

This reasoning involves a re-statement of the argument advanced in the *Doyle* case. Its attempted distinction of that decision from the *Morse* case fails to reveal any substantial difference and the decision has the effect of making the validity of the State's act turn upon the means of attaining the same unlawful end. Justices Day and Harlan filed a vigorous dissent, in which they maintained that the decision in the *Morse* case is founded upon the better reason and should have controlled the court in the instant case; that the *Doyle* case was erroneously decided and was in effect overruled in *Barron v. Burnside*. Speaking of the latter case, Mr. Justice Day said:

"It is thus apparent that the decision was made to turn, not upon the question of whether the agreement not to remove had been required in advance, or imposed as a condition of remaining in the State after entry therein, but rested upon the doctrine that, conceding the right of the State to exclude foreign corporations, its right to do business within the State could not be conditioned upon the surrender of a privilege secured to it by the Constitution and laws of the United States, and that the right to remove given to a foreign citizen or corporation was a right thus secured. The doctrine of Barron v. Burnside is in our judgment decisive of the contention made in the present case. If it be true, as specifically declared in that

case, that the right to exclude a foreign corporation could not be made to depend solely upon the surrender by the foreign corporation of this constitutional right and privilege, it irresistibly follows that its application is fatal to the constitutionality of the statute here in question. The right of the insurance company under the present statute to do business within the State of Kentucky turns upon its willingness to surrender this privilege. If it will do so, it may continue to do business within the State; if it will not, its license will be revoked and its right to do local business destroyed. In short, it may continue to do business within the State, if it will consent to the surrender of a Federal right. We think this brings the case squarely within the limitations of the right of the State to exclude foreign corporations from its midst, and, to sustain the statute, permits a State, because of the exercise of a constitutional right, to close its gates to corporations equally entitled with private citizens in this respect to the protection given by the Constitution. The doctrine that the surrender of rights granted or secured by the Constitution of the United States may be made a condition of the privilege of doing or continuing business within a State is at war with that instrument, and if adopted or sanctioned by all the states would nullify the supreme law of the land in some of its most essential provisions."

After stating that courts and text writers generally had construed the decision in *Barron v. Burnside* as overruling the *Doyle* case, the dissenting opinion, with great force and clearness points out that:

"If a state may lawfully withhold the right of transacting business within its borders or exclude foreign corporations from the State upon the condition that they shall surrender a constitutional right given in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the State from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the State may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the State to exclude, includes the right, when exercised for any reason or for no reason, the State may say to the foreign corporation,—

You may do business within this State, provided you will yield all right to be protected against deprivation of property without due process of law; or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws; and so on through the category of rights secured by the Constitution and deemed essential to the protection of people and corporations living under our institutions. This dangerous doctrine, asserted in the majority opinion in the Doyle case, destroyed and overthrown, as we think, in Barron v. Burnside, which latter case has been consistently and repeatedly followed in this court and in other courts, Federal and State, from that day to this, ought not now to be rehabilitated and restored to its power to work destruction of rights deemed so essential to the safety of citizens, natural and artificial, that they have been secured by the provisions of the Federal Constitution."

In thus apprehending and pointing out the dangerous consequences likely to ensue from the majority opinion, Mr. Justice Day sounds a serious note of warning. We shall endeavor to ascertain whether it has been heeded when the court should thereafter find opportunity of setting itself aright upon this important question.

In 1910 Mr. Justice Harlan, who concurred in the dissent of Mr. Justice Day in the *Prewitt* case, delivered the opinion of the Court in *Western Union Telegraph Co. v. Kansas*[13] and held unconstitutional a Kentucky statute requiring foreign corporations to pay a percentage tax based upon their entire authorized capital stock as a condition for procuring a license to do business in that State. In speaking of what was decided in the *Prewitt* case, he says:

"We come now to the case of Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246, 257, which case, it is contended, necessarily determines the present question in favor of the State of Kansas. In the Prewitt case this court sustained the constitutional validity of a Kentucky statute providing, among other things, that if a foreign insurance company should bring a suit in a Federal court against a citizen of Kentucky, or being itself sued in a state court should remove the suit to the Federal court, without the consent of the other party, any permit previously granted to it to do business in Kentucky should be forthwith revoked by the State Insurance Commis-

(13) 216 U. S., 1.

sioner and the fact of such revocation published in some newspaper of general circulation in the State. No other question was determined. The court regarded the question as concluded in favor of the State by the decision in Insurance Company v. Morse, 20 Wall. 445. It said (p. 257): 'As a State has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial.' The vital difference between the Prewitt case and the one now before us is that the business of the insurance company, involved in the former case, was not, as this court has often adjudged, interstate commerce, while the business of the Telegraph Company was primarily and mainly that of interstate commerce. A decision, such as was rendered in the Prewitt case, that a State could, with or without reason and without violating the Constitution, revoke its permit to a foreign insurance company to do business of a domestic character within its limits, cannot be cited as authority for the proposition, upon which the Kansas statute rests, that a State may prescribe such regulations as to corporations of other States engaged in both interstate and local business, as will require them, as a condition of their doing local business, that they shall contribute a given amount, out of their capital stock, representing all its business, interstate and domestic, wherever done, and all its property, wherever located, in or outside of the State, for the support of the State's schools. The Prewitt case by no means recognized any uncontrollable power in a State to prohibit all foreign corporations, in whatever business engaged, from doing business within its limits. On the contrary, this court said in that very case that 'a State has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the Federal Constitution'—citing various adjudged authorities, among them the case of Hooper v. California, 155 U. S. 648, 652, 653. In the latter case the court recognized, as long settled, the general principle that the right of a foreign corporation to engage in business within the State depended solely on the will of such State. But it took especial care to say that the interstate business of a foreign corporation was a business of an exceptional character and was protected by the Constitution against interference by state authority. The cases

referred to in support of that view are the same as those hereinbefore cited in this opinion. If it be true that the statute of Kansas, by its necessary operation, imposes a burden on the interstate business of the Telegraph Company, and subjects its property and business outside of that State to taxation, then the constitutional validity of the statute, in the particulars adverted to, may be here adjudged without any reference whatever to the judgment in the Prewitt case and without re-examining the grounds upon which that judgment rested. The court did not intend by its judgment in the Prewitt case to recognize the right of Kentucky, by any regulation as to foreign insurance companies, to burden interstate commerce or to tax property located and used without its limits. It could not have done so without overruling numerous decisions of this court on that subject. On the contrary, as we have seen, the court in that case distinctly recognized the principle that a State could not make any prohibition whatever as to a corporation doing business within its limits that would be in violation of the Federal Constitution. In respect of the point actually decided in it we leave the Prewitt case and the objections urged against the doctrine it announces wholly on one side and go no further now than is indicated in this opinion."

The decision in the foregoing case is plainly right, for the reason that the statute under consideration constituted an obvious burden upon interstate commerce, in that it sought to tax the entire capital of foreign corporations—that employed in interstate as well as that devoted to intrastate business. It is, therefore, difficult to understand how counsel seeking to uphold the constitutionality of the Act should have in any view contended that the *Prewitt* case was controlling authority. I have quoted at such length from the opinion in order that it may plainly appear that the court could not have overruled the *Prewitt* case with any binding effect upon subsequent adjudication of the question there decided, for the reason that it was plainly not in point in the case then under decision. This decision, with three other cases decided at the same term and hereafter referred to, is subsequently cited by the Supreme Court as authority for holding unconstitutional State statutes authorizing the revocation of the license of corporations doing business in a foreign State upon removal of a suit to the Federal court when applied to corporations engaged in both intrastate and interstate commerce.

This brings us to the case of *Herndon v. Chicago, Rock Island & Pacific Railway,*[14] decided in May, 1910, in which Mr. Justice Day, who wrote the dissenting opinion in the *Prewitt* case, holds unconstitutional a Missouri statute providing that if a foreign Railroad Company remove a case to the Federal court without the consent of the other party to the action, its license to do an *intra-state* business should be revoked. The opinion states:

> "As to the validity of the act of March 13, 1907, forfeiting the right of the company to do business in the state of Missouri, and subjecting it to penalties in case it should bring a suit in the Federal courts, or remove one from the state courts to the Federal courts, but little need be said. This is so because of the cases decided at this term, involving contentions kindred to the one made in this case. See Western U. Teleg. Co. v. Kansas, 216 U. S. 1; Pullman Co. v. Kansas, 216 U. S. 56; Ludwig v. Western U. Teleg. Co., 216 U. S. 146; Southern R. Co. v. Greene, 216 U. S. 400. Applying the principles announced in those cases, it is evident that the act in controversy cannot stand, in view of the provisions of the Constitution of the United States. Moreover, this is not a case where the state has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. The corporation was within the state, complying with its laws, and had acquired, under the sanction of the state, a large amount of property within its borders, and thus had become a person within the state, within the meaning of the Constitution, and entitled to its protection. Under the statute in controversy, a domestic railroad company might bring an action in the Federal court, or, in a proper case, remove one thereto, without being subject to the forfeiture of its right to do business, or to the imposition of penalties provided for in the act. In all the cases in this court discussing the right of the states to exclude foreign corporations, and to prevent them from removing cases to the Federal courts, it has been conceded that while the right to do local business within the state may not have been derived from the Federal Constitution, the right to resort to the Federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof. It is enough now to say that within the principles decided at this term, in the cases cited above, the act of March 13, 1907, as applied to the complainant rail-

(14) 218 U. S., 135.

road company, in view of the admitted facts set out in the bill in this case, is unconstitutional and void."

Attention is directed to the statement of the court that "little need be said" as to the validity of the Act under consideration because of the cases "decided at this term involving contentions kindred to the one made in this case," alluding to the *Kansas* decision and the subsequent cases to which I have just made reference. These cases, however, as I have heretofore undertaken to point out, hold unconstitutional State statutes obviously imposing a burden upon interstate commerce by undertaking to tax in the form of entrance fees the entire capital of foreign corporations, regardless of the class of business in which it may be employed. The Missouri statute under consideration in the *Herndon* case presents, it seems to me, an entirely different constitutional question. The act there under review provides that if any foreign Railroad Company shall remove a suit to the Federal Court, the license of such corporation "to carry passengers or freight from one point in this State to another point in this State, shall forthwith be revoked," but it is expressly provided that such revocation "shall not be deemed to prohibit or prevent such corporation from . . . making what are known as interstate shipments and transportation."

No burden is thereby imposed upon interstate commerce in contravention of the Railroad Company's constitutional right to carry on that class of business without interference from local legislation. On the contrary, the Act touches only upon the intrastate business of the corporation, and in effect says that such a Company may either refrain from removing cases to the Federal courts or forfeit its right to do a purely local business, concededly subject to State control. In the practical application of such a law, a foreign railroad company desiring to do intrastate business is afforded the same option declared to be justifiable in the *Doyle* and *Prewitt* cases, for the reason that as such a corporation has no constitutional right to do a purely local business, the State may revoke its license to so engage without reference to its reason for so doing.

If the Missouri statute had provided that upon removal of a suit to the Federal court the license of a foreign railroad

company to do all business in that State should be revoked, a very different question would have been presented. Such were the terms of the Oklahoma and Wisconsin Acts held unconstitutional in *Harrison v. St. Louis & San Francisco R. R.*,[15] decided Feb. 19, 1914, and *Wisconsin v. Phila. & Reading Coal Co.*,[16] decided May, 1916. In these cases the statutes made no distinction in the character of business affected and were consequently, and it seems properly, held unconstitutional, for the reason that their enforcement would necessarily result in an interference with interstate commerce. The language of the Chief Justice handing down the decision in the first of these two cases is of special interest. He says:

> "The proposition that the constitutionality of the statute and the action taken under it, is supported by the decisions in Doyle v. Continental Insurance Company, 94 U. S. 535 and Security Company v. Prewitt, 202 U. S. 246, is we think plainly unfounded. Those cases involved state legislation as to a subject over which there was complete state authority, that is, the exclusion from the State of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a State of its right to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the State to exert its lawful power. But that the application of those cases to a situation where complete power in a State over the subject dealt with, does not exist, has since been so repeatedly passed upon as to cause the question not to be open. Western Union Telegraph Co. v. Kansas, 216 U. S. 1; Pullman Co. v. Kansas, ib. 56; Textbook Company v. Pigg, 217 U. S. 91; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, and Herndon v. C., R. & I. P. Ry., 218 U. S. 135. The grounds of the decision in the last case show the extremely narrow scope of the rulings in the Doyle and Prewitt cases, and render their inapplicability to this case certain. Indeed, the ruling in the Herndon Case and in those subsequent to the Doyle and Prewitt cases, most of which were reviewed in the Herndon Case, demonstrates that no authority is afforded by those two cases for the conception that it is within the power of a State in any form, directly or indirectly, to destroy or deprive of a right conferred by the Constitution and laws of the United States."

(15) 232 U. S., 318.
(16) 241 U. S., 329.

The foregoing decision and the opinion of the court in *Wisconsin v. Phila. & Reading Coal Company, supra,* protect from the effect of anti-removal statutes those rights secured by the Federal constitution to corporations engaged in interstate commerce. By what process of reasoning and upon what principle of constitutional law are rights of that character entitled to greater security than those equally guaranteed by the same instrument? If a local law interfering with rights arising in the conduct of interstate commerce be for that reason unconstitutional, why should not a similar law seeking to deny the right to resort to Federal courts provided by the constitution and laws made in pursuance thereof meet with equally vigorous and unequivocal condemnation? But it is stated that the right of a foreign corporation to do business in a State is not secured or guaranteed by the Federal constitution. Conceding the soundness of this general proposition, it by no means follows, as was stated by Mr. Justice Day in the dissenting opinion in the *Prewitt* case "that a foreign corporation may be excluded solely because it exercises a right secured by the Federal Constitution. For, conceding the right of a State to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution. If this were otherwise, the State would be permitted to destroy a right created and protected by the Federal Constitution under the guise of exercising a privilege belonging to the State, and as we have pointed out, the State might thus deprive every foreign corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the Federal Constitution."

The court in the *Harrison* case states that its ruling in the *Herndon* case "demonstrates that no authority is afforded by" the *Doyle* and *Prewitt* cases "for the conception that it is within the power of a State, in any form, directly or indirectly, to destroy or deprive of a right conferred by the constitution and laws of the United States," and points out that the grounds of the decision in the *Herndon* case "show the extremely narrow scope of the ruling in" the *Doyle* and

Prewitt cases. We may, therefore, return to the *Herndon* case for further light upon the court's present view of the effect of those cases. Bearing in mind that the opinion in the *Herndon* case holds unconstitutional a statute revoking the license of a foreign railroad Company to do an intrastate business if it exercise a federal right of removal, it is highly significant that the court in so deciding assigns as an objection to the validity of such an act a constitutional principle equally applicable in determining the power of a State to deal in like manner with foreign insurance companies doing a purely local business. The court says:

> "Under the statute in controversy a domestic railroad company may bring an action in the Federal court, or in a proper case remove one thereto, without being subject to the forfeiture of its right to do business, or to the imposition of penalties provided for in the Act."

This reasoning seems quite as pertinent and controlling when applied to foreign insurance companies already in the State, complying with its laws, and which have through the acquisition of property "become a person within the State within the meaning of the constitution and entitled to its protection." The denial to such corporations, therefore, of a right concededly within the power of an individual or domestic corporation in an otherwise proper case, to institute in or remove a case to the Federal court, is manifestly a with-holding of that equal protection under the local law guaranteed by the Federal Constitution.

With these considerations in mind, it may be stated with much show of reason that the *Herndon* decision in effect, if not in terms, overrules the *Prewitt* case. The court goes on to say that,

> "In all the cases in this court, discussing the right of the states to exclude foreign corporations, and to prevent them from removing cases to the Federal courts, it has been conceded that while the right to do local business within the State may not have been derived from the Federal constitution, the right to resort to the Federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof."

This being true, the court, if it has not already done so in the *Herndon* case, should embrace the first opportunity to

correct the long-standing error and judicial injustice committed in the *Doyle* and perpetuated in the *Prewitt* cases. There can be no reasonable distinction between the recognized limitation which the constitution imposes upon the power of the State to decline to admit a foreign corporation to come into its limits, except upon the surrender of Federal rights, and the authority to deny to such a corporation the privilege of continuing business except upon a similar condition.

By reason of the great amount of business conducted by most insurance companies in foreign states, the right to remove an otherwise proper case to the Federal courts is one which should not be lightly legislated away, and it seems to me to be of the highest importance that we, as insurance lawyers, should take serious counsel in an effort to prevent judicial denial of a right guaranteed our clients under the Constitution and laws enacted in pursuance thereof, and which is oft-times so essential to a just determination of their rights in foreign states.